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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 545

LAURIE J. CARPENTER,

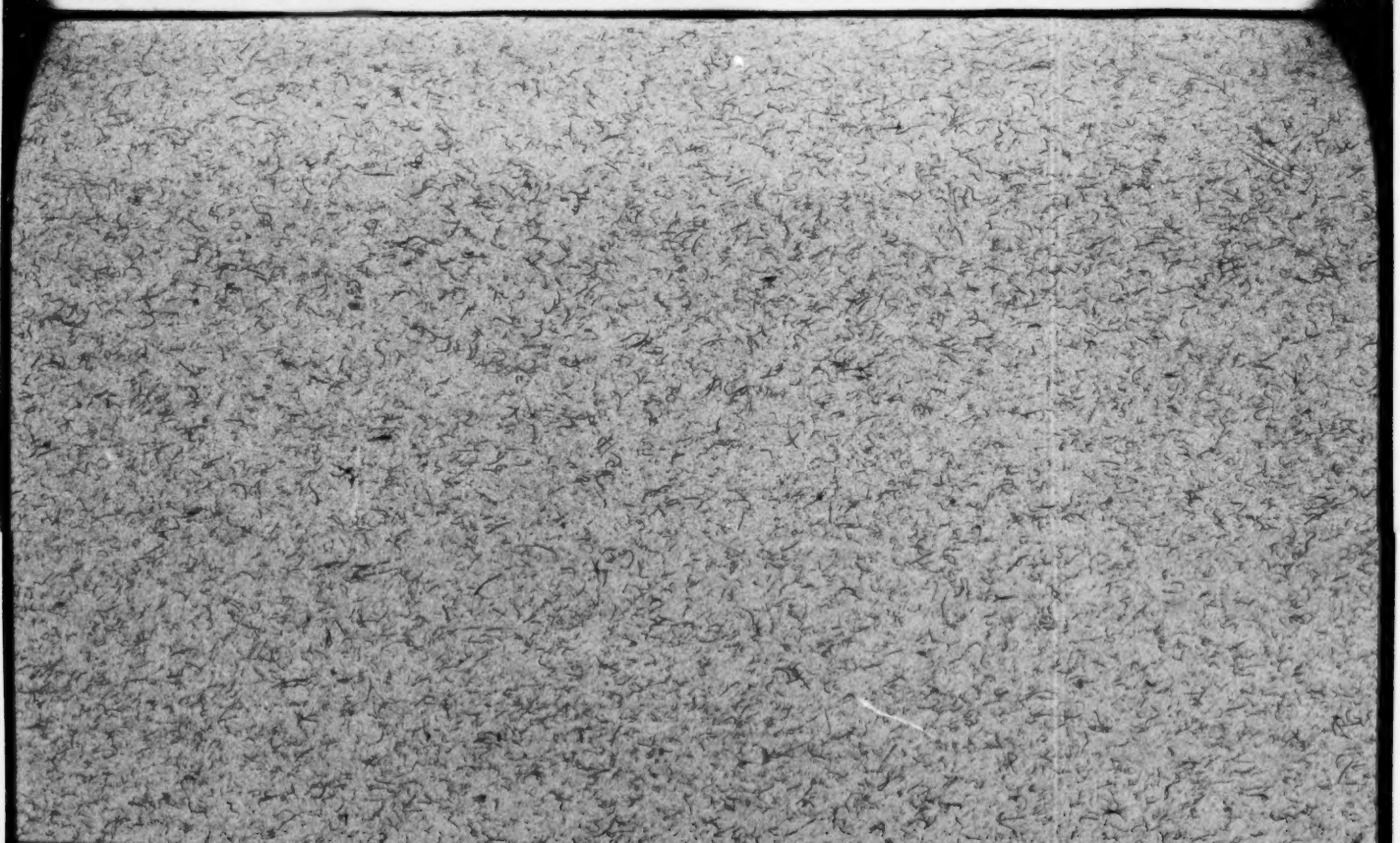
Petitioner

vs.

ERIE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LAURIE J. CARPENTER,
Plaintiff in Person,
458 W. 35th St.,
New York 1, N. Y.



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LAURIE J. CARPENTER,

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ERIE RAILROAD CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF OF PLAINTIFF IN PERSON.

Petition for Certiorari

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Laurie J. Carpenter, respectfully submits his petition for a writ of certiorari to review the decree of the United States Court of Appeals for the Second Circuit in the above entitled case.

The Court of Appeals for the Second Circuit has affirmed an order, dismissing the complaint in the District Court

of the United States for the Southern District of New York.

The jurisdiction of the Court is invoked for a Court of Appeals rendering a decision probably in conflict with the applicable decisions of this Court and rendering a decision holding a Federal Statute inapplicable.

The question presented is U. S. Statutes, Volume 60, part 1, Chapter 540, Section 43 and Section 46 applicable and are all actions *res judicata*?

The reason relied on is the opinion in *Toledo Scale Co.* v. *Computing Scale,* 261 U. S. 399, page 412, "only a final decree is res judicata" and *N. Y. C. & H. R.* v. *Kinney,* 260 U. S. 340, that an action may proceed without pleading the law and "if a defendant had notice from beginning that the plaintiff sets up and is trying to enforce a claim against it because of a specified conduct, a liberal rule should be applied."

The Court of Appeals made a finding of fact that it was an accident, where the pleading had established that there was negligence.

LAURIE J. CARPENTER,
Plaintiff in Person,
458 W. 35th St.,
New York 1, N. Y.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

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BRIEF IN SUPPORT OF PETITION

Jurisdiction of the Court

The jurisdiction of the Court is invoked for a Court of Appeals rendering a decision probably in conflict with the applicable decisions of this Court and rendering a decision holding a Federal Statute inapplicable.

Argument

SUMMARY

The new Federal Right in Title 15, Section 1125a, is not a Trade Mark Law as the decision holds. The Chapter 540 in Statutes 60, part 1, Sec. 46 • • • "All acts and parts of acts inconsistent herewith are hereby repealed." • • •

There is evidence of misrepresented service of medical care required. This would be an extrinsic fraud to prevent a right in Court. It is a misrepresented service applying to Title 15, Section 1125a.

Title 15 is Commerce and Trade law. The Section 1125a is printed in the record Page 12a.

(A similar statute in Trade Mark law is Title 15, Sec. 1114.)

The name of a locality in Title 15, Sec. 1125a can not be appropriated as a Trade Mark. *California Apparel Creators* v. *Weider of California*, 162 Fed. 2d 893, C. C. A. 2nd, 1947.

Actions *in personam* are not *res judicata*, actions *in rem* are. *Kline* v. *Burk Construction Co.*, 260 U. S. 226.

Where proceedings for setting aside or modifying judgment have been commenced during term, Court's control does not cease at expiration of term, *Hiawassee Lumber Co.* v. *U. S.*, 64 F. 2d 417.

The Federal Employer's Liability Act is not a right created by statute, where there was no contributory negligence. The right existed in the state laws. If the right was not created by statute the right did not expire with its limitation. If the right existed before the limitation statute, it can be extended.

A separate action is allowed for extrinsic fraud. *Wallace* v. *U. S.*, 142 F. 2d 240-244.

Argument

Those unsuccessful actions on a ruling of limitations should have all succeeded, if the cause of action had accrued.

The first one in N. J. State Court was within the time alloted. The defendant moved for a non suit. The Court did not direct which Court to proceed in, but there had been no proceeding in equity to enjoin issues.

The action in the Southern District in 1934 was dismissed under rule 106 of the Civil Practice Act of N. Y., that the complaint did not state facts sufficient to constitute a cause of action. Opinion of Judge Caffey record page 14a. The other ground that the cause of action did not accrue within the time limited under rule 107 C. P. A. implies that there was a cause of action and is impeached by the ruling that the complaint did not constitute facts sufficient to constitute a cause of action.

It would be error to dismiss on the merits, when the complaint did not constitute facts sufficient to constitute a cause of action. *McCammon* v. *Kaiser,* 112 N. E. 572, 218 N. Y. 46.

The action in United States District Court in New Jersey involves a review of the non suit in New Jersey State Court. As the state court had already made a review and ruled that there was no new evidence in fact or in law, there was nothing to be added. It is disputed that the District Court said they had no jurisdiction. The decision holds the appeal of that, *Carpenter* v. *Erie,* 132 F. 2d 362, to be an adverse finding of limitations.

If according to the appeal above, it is incumbent on a party suing under the act to allege and prove that an action is within the time limited, the action was so within the time as counting from the State Court action.

The decision holds the second action in the Southern District to be *res judicata* finding of limitations, by reason of the Appeal, *Carpenter* v. *Erie,* 170 F. 2d 73, 336 U. S. 904. That action had new medical evidence.

There has been some effort to make prior actions part of the succeeding ones as ancillary proceedings.

The theory is explained in *N. Y. C. & H. R.* v. *Kinney,* 260 U. S. 340, page 346. "• • • but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of a specified

conduct, the reasons for the statute do not exist and we are of the opinion that a liberal rule should be applied." The opinion is repeated in *Tiller* v. *Atlantic Coast Line*, 323 U. S. 574, page 581, in *U. S.* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, page 69. In *Damiano* v. *P. R. R. Co.*, 161 F. 2d 534, a claim for state compensation was not a specified conduct of negligence.

A cause of action does not accrue on the date of the injury, *Dusek* v. *Penn R. Co.*, 68 F. 2d 131.

The decision calling the case an accident may not be substantive, being only a use of the language, that an accident is an unexpected event. An action for negligence with Court and Jury is retained in the New Jersey Workmen's Compensation Law. 34:15.

Information of another Medical text book is discovered since taking the last appeal.

A new analogy from the exhibit of the restoration of the salient angle after fracture of the Os Calcis, that there has been an inverted fracture of the os calcis is substantive. In medical literature the ligaments will break a phalanx or will break a knee cap. It should be added to Dr. Lippert's report. Conclusion: Chronic ligamentous tearing * * * (Report record page 10a)

In the report History should be changed. He presumes that X rays were taken and the foot strapped. There were no original X rays, but it suggests that there should have been.

The History that Duke Hospital advised wearing a brace should be that they said they were willing to make a brace, but did not advise it.

It is not established that prior X rays showed any damage. Those made by the defendant in 1932 were sent to a laboratory for interpretation with a finding of no damage.

It was only a slight reduction in clearance for cartilage padding between the tibia and astragalus bones.

The indications are that the position for X ray pictures used was not a specialized supervision.

If the practice had been known at the making of the last X ray pictures that in dislocation without displacement no weight is borne until after 8 weeks, it would have been tested then. It would have been tested at any time before without such information, if it had been permitted.

Respectfully submitted,

LAURIE J. CARPENTER,
Plaintiff in Person,
458 W. 35th St.,
New York 1, N. Y.

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LAURIE J. CARPENTER,

Petitioner,

—v.—

ERIE RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

No opinion was delivered by the United States District Court for the Southern District of New York. The opinion of the United States Court of Appeals for the Second Circuit has not been as yet reported. The decision was dated December 29, 1949, the case bearing Docket No. 21460. The opinion reads as follows:

> "The trial judge necessarily dismissed the complaint. The plaintiff had previously asserted his claim in an action brought in the District Court for the District

of New Jersey which was decided against him by the Court of Appeals for the Third Circuit, 132 F. 2d 362, cert. den. 318 U. S. 788. He again asserted his claim in the Southern District of New York and lost on appeal to this Court in a decision reported at 170 F. 2d 73, cert. den. 336 U. S. 904.

The accident for which plaintiff seeks recovery occurred on June 12, 1928. Both of the earlier actions were held barred by the statute of limitations. He is precluded from recovery in the present suit under the rule of *res judicata*. He makes the further argument that he is entitled to recover under Section 1125 (a), Title 15 U. S. C., of the Trademark Law, but that section is applicable to no such circumstances as those alleged in support of his claims. It is entirely evident that his claims are all barred and have been decided against him at various times. His continued reassertion of them can never justify a recovery.

Judgment affirmed."

Statute Involved

Section 56 of the Federal Employers' Liability Act (45 U. S. C. §56), as in effect on June 12, 1928, provided:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

The period of limitations was subsequently extended from two to three years by Act of August 11, 1939, Ch. 685, §2, 52 Stat. 1404.

Statement of the Case

This is an action commenced on July 27, 1949 under the Federal Employers' Liability Act to recover damages for an injury to plaintiff's foot alleged to have been sustained on June 12, 1928 (R. 21-25). Defendant moved for summary judgment upon the ground that the action was barred by the statute of limitations and that the issue of limitations was already *res adjudicata* between the parties (R. 13-A). The motion was granted and the complaint was dismissed (R. 3-A). The Court of Appeals affirmed (R. 46).

This is the fifth and latest of a series of actions brought by plaintiff against defendant on the same claim in various jurisdictions. In one of the previous actions, which was in the United States District Court for the Southern District of New York on December 27, 1934, the complaint alleged that the cause of action remained in existence "also on account of a condition of insane poor and former attempt" (R. 37).

In all these actions the plaintiff has maintained that he sustained on June 12, 1928 certain injuries to his foot (R. 30). In the action started in 1934 defendant moved for judgment dismissing the complaint. This motion was granted with an opinion by Judge Caffey, dated February 2, 1935 (R. 14-A). In this opinion the Court pointed out that the accident occurred on June 12, 1928 and that the action was commenced on December 28, 1934 and that under the two-year statute (45 U. S. C., §56) the complaint should be dismissed. An order dismissing the action was duly entered.

As appears from Judge Caffey's opinion (R. 14-A) a still earlier action had been brought by plaintiff against defendant in the Supreme Court of New Jersey, which resulted in a non-suit on September 29, 1932.

As appears from the opinion in *Carpenter* v. *Erie RR. Co.*, 132 F. 2d 363 (C. A. 3rd, 1942), cert. den. 318 U. S. 788, still another action was brought by plaintiff in the United States District Court for the District of New Jersey subsequent to Judge Caffey's decision. A dismissal, upon the ground of limitations, of the action brought in the District Court of New Jersey was affirmed by the Court of Appeals for the Third Circuit and plaintiff's petition for certiorari was denied by this Court on April 12, 1943.

This issue has been before the Supreme Court as recently as the October Term 1948. At that time certiorari was denied in a decision reported in 336 U. S. 904.

In the instant case the Court of Appeals for the Second Circuit used the following language:

> "The trial Judge necessarily dismissed the complaint * * *. It is evident that his (plaintiff's) claims are all barred and have been decided against him at various times. His continued reassertion of them can never justify a recovery."

ARGUMENT

The decision below was clearly correct.

A cause of action under the Federal Employers' Liability Act accrues on the date of the accident and the period within which suit must be commenced runs from that date. *Reading* v. *Koons*, 271 U. S. 58, 62 (1926).

Since it affirmatively appeared from the face of the complaint that the instant action was not commenced until some twenty years after the accrual of plaintiff's cause of action, it was required to be dismissed and defendant's motion for summary judgment was properly granted. *Carpenter* v. *Erie R. Co.*, 132 F. (2d) 362, cert. den. 318 U. S. 788. See also *Carpenter* v. *Erie R. Co.*, 170 Fed. (2d) 73, cert. den. 336 U. S. 904.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVIS POLK WARDWELL SUNDERLAND & KIENDL,
Attorneys for Respondent.

J. ROGER CARROLL
Of Counsel.

New York, N Y., February 6, 1950

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—v.—

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Respondent.

PETITION FOR A REHEARING OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAURIE J. CARPENTER,
Plaintiff in person,
458 West 35th Street,
New York 1, N. Y.

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IN THE

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—v.—

ERIE RAILROAD CO.,

Respondent.

PETITION FOR A REHEARING OF A PETITION FOR CERTIORARI

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Laurie J. Carpenter, respectfully submits his petition for a rehearing of a petition for a writ of certiorari to review the decree of the United States Court of Appeals for the Second Circuit in the above entitled case.

1. The brief in opposition misquotes *Reading* v. *Koons*, 271 U. S. 58 to say that a cause of action accrues on the date of the accident.

2. The present action in the Southern District No. 51-102 should be a means to modify No. 45-450 under rule 60b rather than to fix it as *res judicata*.

3. By defendant's oral argument in No. 45-450 by reason of a petition for certiorari, which was not perfected, 318 U. S. 788, any other action would have to be brought originally in this Court.

4. The Court of Appeals opinion that "all his claims have been found against him at one time or another," taken literally means that plaintiff cannot bring any claim in any court.

ARGUMENT

1. The brief in opposition said that cause of action accrues on the day of the accident, *Reading* v. *Koons*, 271 U. S. 58. That case does not use the word accident and it further says, there is no definition of the word "accrual" by means of which it may be said that a cause of action accrues at one time or another.

In *Dusek* v. *Penn R. Co.*, 68 F. 2d 131, it is actually said that cause of action does not accrue on the day of the injury. Both cases are survivor death actions.

Cited from *Carpenter* v. *Erie*, 318 U. S. 788 case of *Collier* v. *Goessling*, 160 Fed. 604, for accrual of a cause of action there must be a party in existence capable of suing or being sued and a court in which to sue.

2. The present action in the Southern District No. 51-102 should not fix No. 45-450 as *res judicata* but should be a means to modify the other judgment. In rule 60b of the code a new action has the same force to modify a judgment as a motion.

It was not expected that the first prior action in the Southern District No. L. 60, p. 20 would be held as *res judicata*, since the opinion of Judge Caffee said it applied

to the facts of the complaint. The finding there that the complaint did not state facts sufficient to constitute a cause of action and the cause of action did not accrue within the time limited implies that there was a cause of action and in view of the finding otherwise in the same proceeding, should be made void. Rule 60b does not specify a period in which a void judgment must be set aside.

The brief in opposition cites the case of *Carpenter* v. *Erie*, 132 F. 2d 362, cert. den. 318 U. S. 788. In that action the summons was tested before serving so it was not a case of limitation of a right created by statute. The appeal opinion said, "it is incumbent on a party suing under the act to allege and prove an action is within the time limited." It appears from the petition that the incumbence was fulfilled all the time in an action in the New Jersey State Court.

Respectfully submitted,

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